February 29, 1996

Subject: Region 10 Questions & Answers #1: Title V Permit Development

From: Joan Cabreza,
Air Permits Team Leader

To: Region 10 State and Local Air Pollution Agencies

Region 10 has now had a chance to review draft and proposed Title V permits from several different state and local agencies. We've noticed several issues that seem to be common to all the permits we've seen so far.

To assist all of you in the permit development process, whether you are currently issuing permits or only in the beginning stages, we have, in consultation with our Office of Regional Counsel and OAQPS, developed the attached set of "guidance" in the form of questions and answers. Because much of it was developed in response to Washington issues, some of the these answers contain WAC citations, however, we believe it will be useful for other states as well. Hopefully it will address many of your questions, and help you to avoid some common pitfalls. We also urge you to work with your Attorney General in developing overall approaches for addressing these and other legal issues.

A second set of questions and answers coming out in the next few days will address a series of questions posed by OAPCA and NWAPA. We will continue to issue additional lists as we feel it is necessary and useful.

We appreciate the opportunity to work with you on these permits. Please call Elizabeth Waddell (206/553-4303) or me at (206) 553-8505 if there are more issues that you would like us to look into. Also, please let us know if you disagree with anything in this memo or if you have other suggestions for how to deal with these issues.

CC: Attorneys General

Region 10 Questions and Answers #1: - Title V Permit Development

1. What is the best way to cite the applicable requirements?

There are four approaches that we've seen to including applicable requirements in the permit. The first is to simply state that "The emission unit(s) is subject to the following regulations, which are incorporated herein by reference:" and then to list the citations. This is known as "incorporation by reference," which is legally different than just including a citation to an applicable requirement. For example, for the general opacity standard, in many cases, you would write:

WAC 173-400-040(1)(a) and (b)

This has the advantage of making permits short and easy to put together. Assuming that the lead-in language to the list of citations clearly states that the source is subject to the listed regulation and that it is unambiguous how each regulation or requirement applies to the source, this approach may also have the advantage of being legally clear and straightforward. It has the disadvantage, however, of requiring the source, the general public, and EPA to flip back and forth between the permit, regulations, NOCs, etc., thereby defeating much of the purpose of Title V, which is to create a stand-alone document. In addition, simply listing the applicable citations may also be inadequate in some cases for meeting the requirements of a Chapter 401 permit. For example, if a permit cites to a requirement that is incomplete or ambiguous, such as an old NOC condition that simply limits annual emissions, the permit term would not be enforceable as a practical matter. Some gapfilling must be included to make a permit condition of this type enforceable and to ensure compliance with all applicable requirements, as required by title V.

The second approach is to copy verbatim all relevant portions of the regulation or NOC, etc., that apply. Using the same example as above, the opacity standard would be listed as:

> "WAC 173-400-040.1 Visible emissions. No person shall cause or permit the emission for more than three minutes, in any one hour, of an air contaminant from any emissions unit which at the emission point, or within a reasonable distance of the emission point, exceeds twenty percent opacity except:
> (a) When the emissions occur due to soot blowing/grate cleaning and the operator can demonstrate that the emissions will not exceed twenty percent opacity for more than fifteen minutes in any eight consecutive hours. The intent of this

provision is to permit the soot blowing and grate cleaning necessary to the operation of boiler facilities. This practice, except for testing and trouble shooting, is to be scheduled for the same approximate time each day and ecology or the authority be advised of the schedule.
(b) When the owner or operator of a source supplies valid data to show that the presence of uncombined water is the only reason for the opacity to exceed twenty percent."

This second approach is also legally clear and straightforward, and certainly provides the source, the general public, and EPA with a lot of information. The disadvantages of this approach, obviously, are that it is very time consuming (even if you set up "macros") and will produce a very long document. Not surprisingly, no one to our knowledge is taking this approach! However, it is an option.

The third approach is in essence a combination of the two discussed above: stating the operative requirements of the applicable requirement in the permit condition (such as the emission limit, averaging period and test method) and incorporating the rest by reference by listing the citation for the complete statement of the applicable requirement. The above example would then become:

No emission unit shall emit for more than three minutes, in any one hour, an air contaminant which, at the emission point, or within a reasonable distance of the emission point, exceeds twenty percent opacity as provided in WAC 173-400-040(1)(a) and (b) incorporated herein by reference, except for scheduled soot blowing/grate cleaning or due to documented water.

This hybrid approach has the advantage of providing the source, the public, and EPA with the basic information that tells what the source's limits are in a concise, user friendly document.

Note that in this third example, the part of the applicable requirement that is included in the permit follows verbatim, or as closely as possible, the language in the underlying applicable requirement. This is to minimize the likelihood of any potentially relevant conflict between the language in the condition in the permit (which would be the version enforceable against the source if the source is granted the permit shield) and the underlying applicable requirement. Even a very carefully worded paraphrase potentially changes the meaning of a regulation or applicable requirement. We are very concerned that any seemingly minor differences between the language in the permit and the language in the underlying applicable requirement could

later turn out to be meaningful. To the extent you do decide to paraphrase an applicable requirement, please be very careful to ensure you do not change the requirement in the process. Obviously, a typographical error such as "20% opacity, 6 minute averaging" creates confusion and potentially undermines the enforceability of the permit even with "pursuant to's" or "in accordance with." Also, the opacity condition is a relatively simple example. Other conditions are much harder to paraphrase without changing the meaning.

A fourth approach we have seen may also be a hybrid between merely including the citation for the applicable requirement and giving the operative requirements:

20% opacity, 3 minute averaging
WAC 173-400-040.1 (a) and (b)

We do not believe, however, that this approach unambiguously incorporates all of the remainder of the referenced WAC into the permit, and therefore do not believe that this approach meets the requirements of part 70. Instead, we believe a source could argue that the only enforceable requirements of this condition are the 20% limit and the averaging period, and that the referenced WAC was merely a citation of the authority for that permit term (which part 70 and the Washington regulations require), not an incorporation of the entire referenced WAC by reference.

It also must be clear that the version of State or local rules that are incorporated into the permit are the versions in the EPA-approved SIP, specifically, the versions in 40 CFR Part 52, Subpart WW. Where the current State or local is different from that in the EPA-approved SIP, the permit will need to contain both versions - the EPA-approved version in the federally-enforceable portion of the permit, and the State/local version in the State-only portion.

When you send us draft permits, please feel free to identify any language that you'd especially like one of our attorneys to look at or call us ahead of time.

2. How do we put needed information into the permit without turning background information into an enforceable condition?

There are actually two parts to this question. The first part is fairly easy to answer. Put all non-enforceable background information, calculations, etc., in a technical support document that is clearly separate from the permit itself. One way to accomplish this is to state up front in the document

that the enforceable permit consists of "part A" (or however you want to designate it) and that the technical support document, permit report, appendices, attachments (or whatever you want to call the rest of the document) is for background information only and is not enforceable.

The hard part of this question is determining what parts of the document need to go where. For example, the description of the facility generally should not be part of the enforceable permit. However, the facility description may also include equipment serial numbers and these serial numbers may need to be part of the permit. In some cases, it may be confusing to separate out all of the enforceable conditions from background information. So, for example, the permit might identify the applicable requirements for a unit and then note, parenthetically, that unit is currently not in service. The fact that it is not in service is useful information, but it is not an enforceable condition and this must be clearly stated.

3. Should/must the requirements of an operation and maintenance plan be part of the permit?

If the SIP requires a source to have and comply with an operation and maintenance plan (O&M plan), then the permit must require the source to have and comply with an O&M plan. A related question is whether the O&M plan can be changed outside of the process for making changes to Chapter 401 (Title V) permits (i.e. off-permit changes, minor modifications, significant modifications, etc.). Sources and permitting authorities may want the source to have the flexibility to easily modify its O&M plan. The answer to this question may depend on what is in the O&M plan. In the permit we reviewed, the O&M plan contained not only requirements for ensuring good operation and maintenance of the facility, but also requirements for determining compliance with applicable requirements. To the extent an O&M plan contains provisions designed to meet the testing, reporting, recordkeeping and compliance requirements of Chapter 401, the O&M plan cannot be changed outside the process for revising a Chapter 401 permit.

For example, in the permit we reviewed, the O&M plan contained a list of procedures the source was required to undertake to control fugitive dust. Because this list was presumably included in the permit as a means of ensuring the source's compliance with the requirement to take reasonable precautions to control fugitive dust, it cannot be modified outside the Chapter 401 process. The O&M plan also contained a definition of startup and shutdown for the source. The purpose of the definitions was unclear, but it may have been for purposes

of determining under what circumstances the source would be entitled to the benefit of WAC 173-400-107. If an applicable requirement provides an exception to a standard during startup and shutdown but does not define those terms, it would be appropriate for the permitting authority to "gapfill" the applicable requirement by adding those definitions in the permit. For purposes of WAC 173-400-107, that should include a finding by the permitting authority of why excess emissions at such times would be "unavoidable." In any case, however, if the definitions are necessary to determine compliance with the applicable requirements, they can be modified only in accordance with the Chapter 401 procedures.

To the extent an O&M plan truly contains only O&M requirements, and does not include any applicable requirements or testing, monitoring, reporting or recordkeeping requirements to ensure compliance with applicable requirements, the O&M plan could be modified outside of the Chapter 401 process if the SIP specified a procedure for making changes to an O&M plan and the change was made in accordance with such procedures.

4. How much "gapfilling" can we do?

This is a great issue! On the one hand, Part 70 and Chapter 401 REQUIRE that we fill in gaps in permit conditions to assure enforceability. On the other hand, we are prohibited from creating NEW requirements through the Chapter 401 permit alone. Sometimes it seems like a fine line between those two mandates!

As discussed above, gapfilling means taking an EXISTING condition and adding whatever is needed to make it clear and enforceable as a practical matter. This usually means taking old permit conditions and writing them the way we would today. <u>Gapfilling does not allow us to CHANGE the existing condition.</u> So, for example, if an old NOC contains a 98 ton/year PM-10 limit you can and must add conditions that make it practically enforceable including, if appropriate converting the annual average to an hourly average. You may NOT, however, change the 98 ton/year limit to a 95 ton/year limit through the Chapter 401 process. You MAY, however, change the limit (or add other limits or do anything else you think is needed) through an NOC or an "091" order (an order issued pursuant to WAC 173-400-091) and THEN incorporate the new limits into the Chapter 401 permit. Sometimes new limits are needed to make the permit workable and are, therefore, in the best interest of the source and so they should be amenable to an "091" order.

Of course, permitting authorities can establish or revise conditions through NOC approvals under WAC 173-400-110 or

regulatory orders under WAC 173-400-030 (66) or can revise or establish PTE limits under WAC 173-400-091 (as appropriate).

On a related matter, please note the distinction between paraphrasing the language in an applicable requirement and "gapfilling," which is essentially adding to an applicable requirement in order to clarify how the requirement applies to the source in question or how compliance should be determined. As stated above, we have real concerns with paraphrasing because of potential arguments regarding why the language was changed. Gapfilling is an intentional supplementation of an applicable requirement. To avoid disagreements regarding why language in the permit differs from the applicable requirement, it is a good idea to discuss any gapfilling in the review report. (Although this may at first glance appear to be a bit onerous, this documentation may be needed in the future to demonstrate conditions were added as a gapfilling measure rather than illegally added as a new conditions).

One last point on gap-filling: some agencies are setting emission limits for air toxics to establish a baseline to use to determine if WAC 173-460 is triggered by a change in method of operation. Since WAC 173-460 is NOT a federal requirement and isn't federally enforceable, you may have more latitude in how you set limits. For example, it may be sufficient to simply show in the permit report what the source's potential to emit is. This then forms the baseline for future calculations. You do need to be compliant with STATE law, though, so you still may not be able to use the Chapter 401 permit to SET limits. We also suggest that you discuss this issue with your Attorney General's Office, because the outcome depends on state law. In any event, any permit term created under the authority of WAC 173-460 must be listed as a "State-only" requirement.

5. Can we just list the most stringent requirement?

WAC 173-401-600 is a little confusing on this point, but the Federal Register notice granting interim approval of Washington's title V program clarifies that the answer is NO, based on a letter from the Washington Attorney General. Section 600 says that the permit must contain ONLY the must stringent condition EXCEPT that where a less stringent requirement "based on the FCAA and rules implementing that act (including the SIP)" exists, both limits must be included in the permit. In other words, all federally-enforceable limits (e.g., anything contained in an NOC, a SIP-approved regulation, NSPS requirement, etc.) MUST be listed in the permit. However, a state-only limit (e.g., an odor requirement) that is less stringent than other requirements need not be listed in the permit.

Although all federally-enforceable applicable requirements must be identified in the permit, in some cases it may be possible to identify the most efficient set of requirements that would assure compliance with all applicable requirements for an emission point so as to eliminate duplicative, redundant or conflicting monitoring, reporting or recordkeeping requirements. EPA is currently preparing guidance on how to accomplish this task; we hope it will be available in March.